

**BEFORE THE  
GOVERNING BOARD  
SOUTH WHITTIER SCHOOL DISTRICT**

In the Matter of the Accusations Against:

**THE CERTIFICATED EMPLOYEES  
LISTED IN ATTACHMENT 1,**

**Respondents.**

OAH No. 2011030575

**PROPOSED DECISION**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 13, 2011, in Whittier. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Aaron V. O'Donnell, Esq., Atkinson, Andelson, Loya, Ruud & Romo, represented the South Whittier School District (District).

Kent Morizawa, Esq., Reich, Adell & Cvitan, represented Respondents, who are identified in Attachment 1.<sup>1</sup>

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Dr. Erich Kwek, the District's Superintendent, made and filed the Accusations in his official capacity.
2. Respondents were at all times mentioned certificated District employees.
3. On March 8, 2011, the Governing Board of the District (Board) adopted Resolution No. 10-11-17, which proposed to reduce or discontinue particular kinds of services encompassing 25.0 full-time equivalent (FTE) positions for the 2011-2012 school year.
4. By no later than March 15, 2011, the Board and certificated employees of the District, including Respondents, were given preliminary notice that those certificated employees' services would not be required for the following school year, pursuant to Education Code sections 44949 and 44955.

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<sup>1</sup> Myrna Sanpascual was initially named a Respondent, but her preliminary layoff notice was rescinded by the District before the hearing commenced.

5. Respondents timely requested a hearing to determine if there is cause for terminating their services. Each was thereafter served with an Accusation. Respondents timely filed Notices of Defense, which requested the instant hearing.

6. Various individuals, including five Respondents, served the District pursuant to a temporary contract. Prior to the hearing, they were non-reelected and released from employment separately and independently from the layoff process. The District contends that such individuals do not possess any such rights to this hearing process. However, those individuals were provided with a preliminary notification of layoff as a precaution, in order to permit them to participate and exercise any claimed rights to the hearing process. The District stated in correspondence that “it is not our intent to convert your temporary employment status to that of a probationary or permanent employee.” The Respondents treated in this way are identified in Attachment 1 as “Precautionary Respondents.”

7. During the hearing, the District withdrew the Accusations against Respondents Greta Benevides and Christopher Losoya.

*The Decision to Reduce or Eliminate Particular Kinds of Services*

8. Resolution No. 10-11-17 specifically provides for the reduction or elimination of the following particular kinds of services:

1.	Middle School English/Language Arts	2.0 FTE
2.	Middle School Science	1.0 FTE
3.	Middle School History/Social Science	1.0 FTE
4.	Middle School Math	1.0 FTE
5.	School Community Counselor	1.0 FTE
6.	K-6 Classroom Teaching	19.0 FTE
TOTAL:		25.0 FTE

9. The decision to reduce or eliminate 25.0 FTEs was the result of financial difficulties experienced by the District.

10. Prior to sending out the preliminary notices mentioned above, the Board considered all known assured attrition.<sup>2</sup>

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<sup>2</sup> A school district is not required to account for circumstances that occur after March 15th when implementing layoff decisions. (*Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977, 982.)

11. Resolution No. 10-11-17 also established that the District has a specific need to hire and retain highly qualified teachers in core academic areas for purposes of the No Child Left Behind Act (NCLB), and therefore authorized the District to deviate from terminating certificated employees in order of seniority (skipping) with regard to those who possess that specific skill and training. No challenge was made to this part of the Resolution.

12. Resolution No. 10-11-17 also defined competency for purposes of bumping and rehire rights. No challenge was made to this part of the Resolution.

13. A. The Board also adopted Resolution No. 10-11-11, which established tie-breaking criteria to determine the relative seniority of certificated employees who first rendered paid service on the same date. The tie-breaking criteria was used in this matter to resolve ties in seniority amongst certificated personnel. The criteria were listed in priority order; each criterion was used only if the preceding one did not resolve the tie.

B. The validity of the tie-breaking process was subject to dispute by one Respondent, who argued that the District only required NCLB compliance for the first criterion regardless of the date that compliance was obtained, while the seventh, eighth and ninth criteria use the date the credentials in question were obtained in establishing priority.

C. The challenge is unconvincing. Districts have discretion in developing tie-breaking criteria. The first few criteria used by the District are based on specific skills, i.e., NCLB compliance and bilingual ability. The last few criteria are based on more general skills. With regard to the first few criteria, it is clear that the District highly values those skills involved. What is important is that teachers are NCLB compliant or bilingual, not the date upon which they became so. In contrast, the last few general criteria tend to be a proxy for greater tenure. Also, there is a likelihood that ties would still remain even when applying the last few criteria by simply analyzing whether the credential were obtained or not. Establishing a priority within that criteria based on the date the general credentials were obtained is a sound way to address that problem, especially given that those remaining ties would tend to be broken based on tenure. Under these circumstances, it was not an abuse of discretion for the District to formulate the tie-breaking criteria as it did.

### *Overall Findings*

14. The reduction or elimination of the FTE positions in question will not reduce services below mandated levels.

15. The District maintains a seniority list containing employees' seniority dates, current assignments and locations, credentials and authorizations. Cecilia Laidemitt, the District's Associate Superintendent of Administrative Services and Personnel Management, and other District administrators, were responsible for compiling the seniority list. To assure the accuracy of the seniority list, certificated employees were notified in writing of the District's records regarding their employment history with the District, in order to allow them to confirm or challenge the accuracy of that information. The seniority list was updated

based on new information obtained from certificated employees that was verified. It was established that the information on the seniority list is accurate.

16. The District used the seniority list to implement and determine the proposed layoffs. In determining who would be subject to layoff, the District counted the number of reductions, and determined the impact on incumbent staff in inverse order of seniority. The District then determined whether the least senior employees held other credentials or were otherwise competent to render services being rendered by junior employees. The District determined that none of the certificated employees subject to layoff through the above-described process were able to bump junior employees.

17. The Board's decision to reduce or discontinue the above-described particular kinds of services was neither arbitrary nor capricious, and was a proper exercise of its discretion.

18. The cause for reducing and/or eliminating the above-described particular kinds of services relates solely to the welfare of the schools in the District and its pupils.

19. No permanent certificated employee with less seniority will be retained to render a service that the Respondents are certificated and competent to render.

#### *Precautionary Respondents*

20. The five Respondents who are in the above-described precautionary status are Carmona, Friedman, Ponce, Avelar-Romo, and Carrasco-Tolentino. These "precautionary" Respondents are all temporary employees. None of these individuals testified or presented evidence establishing that the District improperly classified them as temporary. The District's method of accounting for their positions for purposes of the layoff was proper.

### LEGAL CONCLUSIONS

1. The party asserting a claim or making charges in an administrative hearing generally has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) For example, in administrative hearings dealing with personnel matters, the burden of proof is ordinarily on the agency prosecuting the charges (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113); in personnel matters concerning the dismissal of a teacher for cause, the burden of proof is similarly on the discharging school district (*Gardner v. Commission on Prof. Competence* (1985) 164 Cal.App.3d 1035). As no other law or statute requires otherwise, the standard of proof in this case requires proof to a preponderance of the evidence. (Evid. Code, § 115.)

2. All notice and jurisdictional requirements of Education Code sections 44949 and 44955 were met. (Factual Findings 1-7.)

3. The services identified in Resolution No. 10-11-17 are particular kinds of services that can be reduced or discontinued pursuant to Education Code section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Services will not be reduced below mandated levels. Cause for the reduction or discontinuation of those particular services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949. (Factual Findings 1-19.)

4. Temporary teachers may be released at the pleasure of the governing school board. (Ed. Code, § 44949, subd. (a).) The statutory layoff provisions therefore do not apply to them. (Ed. Code, § 44949, subd. (a); *Zalac v. Governing Board of the Ferndale Unified School District* (2002) 98 Cal.App.4th 838.) The Respondents whom the District classified as temporary employees are not subject to the protections of Education Code sections 44949 and 44955. The Accusations against them should be dismissed, as the District has already provided them with appropriate notices of non-reelection for the following school year. (Factual Findings 1-20.)

5. Cause exists to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services. (Factual Findings 1-20.)

6. No junior certificated employee will be retained to perform services that a more senior employee is certificated and competent to render. (Factual Findings 1-20.)

#### ORDER

1. The Accusations against Respondents Greta Benevides and Christopher Losoya are dismissed. The District shall not give them final layoff notices for the next school year.

2. Respondents Carmona, Friedman, Ponce, Avelar-Romo, and Carrasco-Tolentino are temporary employees who are not subject to this layoff proceeding. The Accusations against them are dismissed for that reason.

3. The Accusations are sustained as against the remaining Respondents. The Board may give a final notice of layoff to those Respondents. Notice shall be given to those Respondents that their services will not be required for the 2011-2012 school year, and such notice shall be given in inverse order of seniority.

Dated: April 21, 2011

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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings

ATTACHMENT 1: LIST OF RESPONDENTS & PRECAUTIONARY RESPONDENTS

1. Ruby Acosta
2. Greta Benavides
3. Robyn Blake
4. Christina Carmona (Temporary Employee – Precautionary)
5. Marjorie Coddling
6. Sophia Fontes
7. Juliawati Friedman (Temporary Employee – Precautionary)
8. Carrie Galloway
9. James Hamilton
10. Yolanda Holguin
11. Janette LaCourse
12. Barbara Llamas
13. Christopher Losoya
14. Lisa Palomino
15. Kimberly Pauls
16. Mariella Elena Ponce (Temporary Employee – Precautionary)
17. Kristen Ryan
18. Connie Sava
19. Denise Zazueta
20. Violet Avelar-Romo (Temporary Employee – Precautionary)
21. Sheril Carrasco-Tolentino (Temporary Employee – Precautionary)
22. Odelisa Orellana